United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1201

To be argued by
MICHAEL Q. CAREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1201

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK GRADY and JOHN JANKOWSKI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Frank Grady and John Jankowski appeal from a judgment of conviction entered on April 23, 1976, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Superseding Indictment 76 Cr. 227, filed March 8, 1976, charged Frank Grady and John Jankowski in Count One with conspiring to make false entries, and to fail to make appropriate entries, in records required to be maintained by a federally licensed firearms dealer, in violation of Title 18, United States Code, Section 371. Counts Two through Eighteen charged both defendants with the substantive offenses of making false entries and failing to make appropriate entries in firearms dealer records, in violation of Title 18, United States Code, Sections 2, 922(m) and 924(a), and Title 26, Code of

Federal Regulations, Section 178.125(e). In Count Nineteen, Frank Grady was charged with having unlawfully exported from the United States ten .30 caliber semi-automatic rifles, in violation of Title 18, United States Code, Section 2, Title 22, United States Code, Section 1934, and Title 22, Code of Federal Regulations, Sections 121 *et seq.* Count Twenty charged Grady with having obstructed a federal investigation of violations of the firearms and ammunition control laws, in violation of Title 18, United States Code, Section 1510.*

The trial of Grady and Jankowski began on March 8, 1976 and concluded on March 12, 1976 when the jury found both Grady and Jankowski guilty of Counts One through Eight and Fifteen through Seventeen and Frank Grady guilty on Count Nineteen.**

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* This indictment superseded Indictment 75 Cr. 435, filed May 2, 1975, which charged Frank Grady and John Jankowski in Counts One through Eighteen with the same offenses charged in Counts One through Eighteen of this Indictment. It also charged Frank Grady alone in Counts Nineteen through Twenty-Eight with the same offenses charged in Count Nineteen of this superseding Indictment and in Count Twenty-Nine with the same offense charged in Count Twenty of this later Indictment.

** Prior to trial Count Twenty had been dismissed. (Tr. 16). The Court dismissed Count Twenty because the Government had failed to comply in a timely manner with an order of Judge Brieant, filed February 25, 1976, which required the Government, with respect to Count Twenty-Nine of the superseded indictment, to file a supplemental Bill of Particulars and serve it upon counsel for defendant Grady, stating the name of the person who was the object of the obstruction of justice. The Court ordered the Government to serve and file the supplemental Bill of Particulars by noon on March 1, 1976. While the document was served as the Court had directed, it was not filed with the Court until approximately 2:30 p.m. on March 1, 1976. (Tr. 13-16).

[Footnote continued on following page]

On April 23, 1976, Judge Brieant sentenced Grady on Count Nineteen to two years' imprisonment, suspending all but four months, and to a term of three years' probation. On Counts One through Eight and Fifteen and Sixteen, the Court suspended imposition of sentence and placed Grady on probation for a term of forty months, to be served concurrently with his sentence on Count Nineteen.

On the same day, Judge Brieant sentenced Jankowski to three years' imprisonment on Counts One through Eight and Fifteen through Seventeen, the sentences to run concurrently.

Judge Brieant granted both defendants' motions to stay the execution of their sentences pending appeal, releasing Jankowski on his own recognizance and Grady on a $5,000 personal recognizance bond.

Statement of Facts

The Government's Case

A. Summary

The evidence at trial demonstrated overwhelmingly that Grady and Jankowski, a federally licensed firearms dealer, concocted a scheme to sell twenty-two .30 caliber carbines to Grady for shipment to Ireland without disclosing in Jankowski's firearms records that Grady and one or two others were the purchasers. Grady, a sympathizer with the cause of the Irish Catholic minority in

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At the close of the Government's case, the Court granted defendants' motions for a judgment of acquittal on Counts Nine through Fourteen and Eighteen. (Tr. 571).

Citations preceded by "Tr." refer to pages of the transcript of trial.

Northern Ireland, then set about recruiting his friends and business acquaintances to satisfy Jankowski's demand that he find someone to sign for each two carbines Jankowski delivered.

Grady successfully recruited nine men who, together with Jankowski, signed Jankowski's records as the purchasers of the carbines without ever paying for or receiving the firearms, all of which were delivered by Jankowski to Grady and two associates and were eventually exported to Northern Ireland. The proof at trial also showed that beginning on March 16, 1971, and continuing through April 5, 1975, authorities in Northern Ireland seized twelve of the twenty-two carbines Jankowski delivered to Grady.

The principal Government witnesses were John O'Brien, William Dennehy, John Casey and Edward McMorris, each of whom signed Jankowski's Federal Firearms Record knowing he was not going to receive the firearm for which he signed, and Richard Anderson, a police officer with the Royal Ulster Constabulary in Northern Ireland, who testified that he brought with him five carbines from Northern Ireland, each of which was a firearm Jankowski had sold to Grady.

B. The Scheme Is Hatched

In early 1970, Frank Grady met with Martin Lyons, John Casey, Martin McCarthy and John O'Brien. Discussions at the meeting concerned the obligations of the men to secure firearms and send them to Northern Ireland to assist in the protection of the Catholic minority. The men each agreed that this needed to be done. (Tr. 74-75, 98, 123, 286-87).

A short time later, John O'Brien, who had known the defendant John Jankowski, a licensed firearms dealer, for over sixteen years, introduced him to Martin Lyons

at Jankowski's sporting goods store in Yonkers, New York. O'Brien introduced Lyons to Jankowski as a man who was concerned about the troubles in Northern Ireland and, as a result, interested in purchasing rifles (large quantities if he could get them unregistered), as well as hand grenades and machine guns. Jankowski, who acknowledged his awareness of the problems in Northern Ireland, explained that in order to supply the men with rifles he would need a signature in his Federal Firearms Record book (the logbook) for every rifle supplied. He added that he could not provide the hand grenades or machine guns. O'Brien and Lyons agreed that they would secure the necessary signatures. (Tr. 75-76, 115-116, 126, 130, 133, 517, 518, 553, 651-652).

C. Jankowski Obtains the Weapons

In April 1970, Jankowski asked George Clearwater, a federally licensed gun dealer, to come to his store. When Clearwater arrived, Jankowski invited him into the back room of his store and asked whether Clearwater could obtain between one hundred and five hundred unregistered carbines. Jankowski told Clearwater that he needed at least a thousand rounds of ammunition for the carbines; that he had a buyer for the carbines and ammunition; and that there was a ship waiting for them. (Tr. 384, 389). Jankowski and Clearwater then agreed that the price for each carbine would be $100. (Tr. 84, 382-84, 389, 395, 424, 553, 637).

Approximately one week later, Jankowski telephoned Clearwater and told him that he no longer required the weapons since he had discovered that he could obtain them in Florida at a better price. (Tr. 385, 388).

Jankowski's Florida supplier turned out to be the Universal Firearms Co. of Hialeah, Florida, manufacturer of twelve .30 caliber carbines, Model M-1-B, which

Jankowski ordered from Roskin Bros. Inc., a New York State wholesaler, on April 29, 1970. The weapons, which cost $75 each, were shipped to Jankowski on May 2, 1970, and Jankowski later listed the twelve carbines in his logbook as having been received on May 4, 1970. (GX 1, 9).

D. Making False Entries in the Logbook Begins

In early May, 1970, the defendant Grady told John Casey that arrangements had been made for the purchase of .30 caliber M-1 carbines from Jankowski. Grady asked Casey if he would be willing to sign for some of the weapons and Casey agreed to do so. (Tr. 227-29).*

Shortly thereafter, Casey accompanied Grady and Lyons on a visit to Jankowski's store, where Casey saw Lyons pay Jankowski over $1,000. No receipt was rereceived for the payment. (Tr. 223, 225, 522). On another occasion, Casey went with Lyons and Thomas Duffy to Jankowski's store where Duffy handed Jankowski a stack of money approximately one inch thick. (Tr. 229-33).**

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* Although, as Jankowski admitted, there was no legal reason why Grady could not have lawfully purchased all of the carbines under his own name, either Grady believed a person could purchase only two semi-automatic weapons, as he told McMorris (Tr. 190), or he used that argument to forestall others from questioning why Grady himself was unwilling to sign for twenty-two carbines if it were legal. (Tr. 542).

** Casey was first introduced to Duffy by Grady in January or February of 1970. At the time of the introduction, Duffy was counting the proceeds from a dinner dance sponsored by the Bronx Chapter of the Irish Northern Aid Committee (Tr. 223-225), an organization of which Lyons was also a member. (Tr. 264).

Finally, in May 1970, Grady took Casey to Jankowski's store. Jankowski showed Casey where to sign in the logbook and Grady cautioned Casey to pay attention and not to make any mistakes. Casey then entered his name in the logbook twice, together with his address, social security number, height and weight. Needless to say, Casey never paid for a weapon, much less received one. (Tr. 233-37, 282, 284, 290-91, 337, 339).*

E. John O'Brien is Convinced to Make False Entries in the Logbook

After Casey had signed Jankowski's logbook, he met with Grady, McCarthy, Luke Dalton and O'Brien. At the meeting, O'Brien initially expressed a reluctance to sign the logbook. He was convinced to do so, however, by Grady who assured him that he himself had already signed the logbook and would protect O'Brien by obtaining for him a transfer paper showing that O'Brien had transferred the weapons to another person. (Tr. 73-74, 102-04, 108, 238).**

After this meeting, O'Brien and McCarthy went to Jankowski's store. Upon entering, they announced to Jankowski that they were there to sign the logbook. Without asking any questions, Jankowski produced the logbook, and the two men each signed their name twice

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* Jankowski's logbook indicates that Casey signed his name on May 6, 1970 and again on May 8, 1970. (GX 9). However, Casey signed the logbook twice on one occasion and it was Jankowski, not Casey, who completed the purchase dates which appear in the logbook. (Tr. 283-84).

** Indeed, Grady had signed for two carbines, one sale dated May 4, 1970 and the second sale dated May 7, 1970. (GX 9, p. 9; Tr. 363). Jankowski also signed fo e. However, neither of these entries were the basis of a substantive charge for falsification of Jankowski's logbook.

and also wrote in their addresses. Again, neither O'Brien nor McCarthy paid any money to Jankowski and they never received, or authorized anyone else to receive, the weapons for which they had signed. Moreover, O'Brien never knew what happened to the carbines. (Tr. 74, 79-83, 105-09, 111-13, 133; GX 9).*

On or about May 16, 1970, a few days after signing the logbook, O'Brien met with Grady, McCarthy, Casey, Lyons and a number of other men. The meeting was for the purpose of forming the Yonkers Chapter of the Irish Northern Aid Committee of which Grady was eventually elected chairman. (Tr. 80-81, 157-58, 225, 227).

During the meeting, O'Brien was handed a document by either Grady or Lyons which indicated that the carbine he had signed for had been transferred to another person by the name of "Patrick Armstrong." ** He was told that, if he were ever questioned about the carbine, he should say that the weapon had been transferred to the person named in the transfer document, though in fact he had not the slightest idea who "Patrick Armstrong" was. (Tr. 81-83, 92-93, 96).***

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* There is simply no support in the record for appellants' statement that O'Brien was told he would have responsibility for his weapon. (Br. at 6). Indeed, such an arrangement would have run contrary to Grady's plans to pick up the firearms himself.

** The alleged transfer document was produced at trial and the serial numbers of the weapons contained therein corresponded perfectly with Jankowski's logbook. (GX 9, 10).

*** At the same meeting, Lyons gave transfer documents to Grady and Casey as well. Each was told to keep it in case he were ever questioned about what he had done with the carbines for which he had signed in Jankowski's logbook. When Lyons handed these documents out, he stated that the persons indicated as the transferees were all dead. Casey was also told that, if he were ever arrested for falsifying information, the Irish Northern Aid Committee would pay his legal fees and provide him protection. (Tr. 239-40, 295-96, 338-39).

F. William Dennehy is Enlisted to Make False Entries

At a meeting with Grady, O'Brien, McCarthy, Casey and Dalton, William Dennehy was enlisted to enter his signature into the logbook. Grady advised Dennehy that he could assist the cause of Ireland by signing for rifles that the men were in the process of purchasing. Dennehy agreed to help. (Tr. 143-45, 172).

Within a week or two of this meeting, Dennehy accompanied Grady to Jankowski's store. There, in the presence of Grady, Jankowski, O'Brien, McCarthy and Casey, Dennehy signed for one carbine which he had been told by Grady was going to Ireland. After he had signed the logbook, Dennehy saw Grady pay Jankowski approximately $150, and Dennehy commented to Grady that he thought the weapon was terribly expensive. Grady replied, in effect, that it was a seller's market. (Tr. 146-51, 165).

Predictably, Dennehy never saw the weapon for which he signed and Jankowski never offered to show it to him. Outside Jankowski's store, Dennehy received a slip of paper from Grady. Grady told him that, if he should ever be questioned by anyone about the carbine for which he had just signed, the slip of paper would prove that he had transferred it to another. (Tr. 149-51, 180).

On July 21, 1970, Dennehy again accompanied Grady to Jankowski's store. Without a word being spoken about the logbook, it was produced by Jankowski and Dennehy placed his signature in it for the second time. Dennehy never paid for the weapon for which he signed, nor did he ever receive it or authorize anyone else to receive it. As Dennehy left the store, Grady once again gave him a document indicating that he had transferred

the carbine to another person. (Tr. 151, 154-55, 166-67, 180).*

G. Edward McMorris is Persuaded to Make False Entries

About July 22, 1970, Grady approached Edward McMorris, an electrician who had previously worked with Grady on a construction job, and asked him if he would sign for two firearms that were to be shipped overseas. Grady stated that this was perfectly legal and that McMorris would be given a document that would show that McMorris had sold the firearms to another individual. Grady then explained the obvious, that McMorris would never receive the weapons he would sign for. (Tr. 182-85, 189, 206).

The two men then went to Jankowski's store, where, after Grady and Jankowski had a brief discussion, McMorris twice entered his signature in the logbook on the lines pointed out by Jankowski.** Jankowski did not ask McMorris why he was there. McMorris never saw any money pass hands, never saw any weapons and never authorized anyone else to pay for or receive the weapons for which he had signed. (Tr. 186-88, 200, 215).

Shortly thereafter, Grady provided McMorris with the promised transfer receipt and told him to add his name, the serial numbers of the weapons he signed for

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* On July 15, 1970, Jankowski ordered ten more .30-caliber carbines from Roskin Bros. Roskin Bros. shipped the firearms the same day (GX 2), and Jankowski entered the firearms in his logbook as having been purchased on July 16, 1970. (GX 9, p. 11).

** McMorris was unable to identify Jankowski as the man who produced the logbook but there was never any suggestion at trial that Jankowski employed anyone other than himself in his small store.

and the date. (Tr. 190; GX 11). As Grady handed McMorris the transfer document, he also told him to keep the paper in the event that he were ever questioned about the firearms. McMorris wrote down the month and day and the serial numbers and then signed the document.* The document listed as the transferee "Michael O'Callahan", a person McMorris did not know and had never met. (Tr. 190, 203).

H. The Carbines Are Removed From Jankowski's Store

On a Saturday night in July, 1970, Grady, Casey and Lyons went to Jankowski's store after 9 P.M. The store was closed, but Jankowski let the men in. After they entered, the men went to the rear of the store where they found stacks of M-1 carbines in boxes. Grady, Lyons and Casey then loaded over twenty-five carbines into Grady's and Casey's cars. Later, after driving some distance from Jankowski's store, all of the firearms were transferred from Grady's and Casey's cars into Lyons' car. Lyons then drove off alone and Casey never saw the firearms again. (Tr. 240-41).

Approximately one month after removing the carbines from Jankowski's store, Grady told Casey that a member of their group had signed for a firearm and that he wanted Casey to pick it up. Casey went to Jankowski's and picked up the carbine. The following day he gave it to Grady. (Tr. 243).

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* At the time McMorris had signed Jankowski's logbook, he made a note of the serial number of the weapons for which he had signed. (Tr. 202).

I. The Continued Movement of Weapons Toward Their Ultimate Destination in Northern Ireland

After the purchases from Jankowski were complete, Grady, Casey and Lyons continued to obtain firearms for shipment to Ireland. In the summer of 1971, Grady and Casey met Jack Lynch in the basement of the latter's home, where Casey saw two trunks, one open, containing approximately twenty rifles and handguns, and another which was closed. The open trunk was stencilled on its side with the name and address of a priest in Galway, Ireland. (Tr. 257-59, 324).

In August of 1971, Grady told Casey that Lyons had dressed up as a priest and shipped two trunks to Ireland by ship. (Tr. 263, 264). Lyons himself once told Casey he had been in the hills with the Irish Republican Army. (Tr. 265).

In the fall of 1971, Grady and Casey went to the home of a person living at Somerville Place in Yonkers and met with the owner. The owner, Grady and Casey then went into the basement where they found a crate loaded with approximately twenty M-1 carbines, bolt-action rifles and automatic rifles. The three men then carried the crate to Grady's car. On the following day, Grady told Casey that he had delivered the crate to Lyons. (Tr. 254-57, 323).*

In the winter of 1971, Grady showed Casey a Sunday Daily News article dated November 28, 1971. (GX 18).

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* On another occasion in the fall of 1971, at night, Grady, Casey and Lyons went to the Bronx where they carried into an apartment a heavy trunk containing weapons. (Tr. 259, 260, 261).

In October of 1971, Grady told Casey to go to Tyrone House for a shotgun. Casey picked up the shotgun and ammunition and delivered it to Grady's home. (Tr. 262, 263).

The article, entitled "The Bomb and the Bullet: Inside the IRA", contained a photograph of a rifleman under which was the caption "Silhouetted by flames from bomb-shattered building, IRA militant watches for appearance of British Troops in hate-ridden Belfast." Grady pointed to the rifle and said that it was one of the weapons for which Casey had signed Jankowski's logbook.* The rifle in the photograph clearly had the configuration of the carbines which had been sold by Jankowski. (Tr. 266, 275, 463; GX 18).

J. The Seizure of the Weapons in Northern Ireland

Between 1971 and 1975, twelve of the twenty-two weapons Jankowski had purchased from Roskin Bros. were seized in Northern Island. (GX 7, 8). These included one firearm signed for by Grady, one signed for by Jankowski,** both of the weapons signed for by O'Brien and by McCarthy, and one weapon each signed for by Dennehy, Casey, John J. Horrigan, James Schweitzer, R. J. Domizio and Richard Florin.*** Neither Jankowski, his store, the J & J Bait Shop, nor Grady were lawfully empowered to have exported these weapons. (GX 5, 6).

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* The title to the article and the caption of the photograph were never shown or read to the jury.

** Neither of these weapons was the subject of any substantive count charging the falsification of Jankowski's logbook.

*** A receipt for the two firearms which Jankowski's logbook indicates were purchased by R. J. Domizio was obtained by the investigating agents from Mr. Domizio. (Tr. 562). The receipt (GX 12) is a typed carbon copy identical, as to the typed portions, with the receipt Grady gave to McMorris. (GX 11).

K. Agent Interviews of Jankowski

In July, 1973, agents of the Bureau of Alcohol, Tobacco and Firearms began an investigation to determine the source of a number of weapons seized in Northern Ireland. As part of their investigation they went to Jankowski's store, obtained his logbook, and interviewed him. (Tr. 512, 514; GX 9). Jankowski then proceeded to provide a variety of stories which were contradictory and largely exculpatory.

When Agent Quinn first interviewed Jankowski at length on September 13, 1973, Jankowski claimed that a number of men had come into his store on various dates and purchased the carbines he had ordered from Roskin Bros. Jankowski conceded that he thought it unusual that so many customers would ask for this type of .30 caliber carbine.* He asserted that a few days after placing their orders, the customers came in and each paid for and removed from the store the rifles they had ordered. (Tr. 514-16).

Approximately five weeks later, on October 23, 1973, Agent Quinn again interviewed Jankowski. Jankowski repeated the story he had told earlier but Agent Quinn volunteered that he disbelieved Jankowski. Jankowski then said he was prepared to tell the "true" story and he revised his account as follows: In late April, 1970, two men entered his store and asked if they could purchase M-1 carbines. Jankowski had none in stock, called Roskin Bros. and informed his customers that he could obtain twelve carbines at a price of $109 each. One of the men, he claimed, also inquired about purchasing submachine guns and hand grenades, but Jankowski said he did not

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* The rifles sold by Jankowski were identical in configuration and weight to the carbine used by our military in the Second World War. (Tr. 698-99).

deal in them. Jankowski asserted he then told the men that someone must sign his logbook for each rifle delivered and that these persons had to be able to produce identification. One of the men said he would have men come in and sign the logbook, and another left a deposit of $100. Jankowski then ordered the carbines from Roskin Bros., and several days later the same two men returned, paid for the weapons and removed them from the store. Jankowski also said he purchased one carbine for himself and sold it to a friend. Finally, Jankowski said that the same process had been repeated in July, 1970. (Tr. 517-19).

Two days later, on October 25, 1973, Jankowski repeated the same story for Agent Quinn, with the following new twists: he now said (1) that he was not sure if the deposit he received was $100 or $200; (2) that he gave the carbine for which he personally signed to one of the two men who ordered the carbines; and (3) that the men did not want a receipt for the deposit they gave him. (Tr. 521-22, 551).

Ten months later, on July 30, 1974, Jankowski admitted in an interview in the United States Attorney's Office that the men who ordered the carbines agreed to purchase large quantities on condition that they could get them unregistered. (Tr. 553).

L. Grady Communicates His Fears of Prosecution to His Co-Defendants

On St. Patrick's Day, March 17, 1974, Grady told O'Brien that things were getting hot and that if anyone came around to interview him, he should call O'Dwyer and Bernstein, Esqs. (Tr. 96, 97). In August, 1973, shortly after the federal investigation began, Grady had told Dennehy that he should not talk if he were picked up concerning the weapons for which he signed Jankowski's logbook. (Tr. 162).

The Defense Case

The only witness to testify for the defense was the defendant Jankowski who sought to contradict the Government's proof.

A. Summary

Jankowski admitted selling twenty-two carbines, but claimed that he was told that all the carbines were being purchased by a rod and gun club. Moreover, he alleged that he thought all of the weapons were signed for by the members of the club. (Tr. 628-29, 632, 668, 669). In addition, he claimed that not only was he never told the rifles were being purchased because of the fighting in Northern Ireland but, incredibly, he asserted that he had not even heard about any trouble in Northern Ireland until 1973 when federal investigators began to question him about his firearms sales. (Tr. 647-50, 682).

B. Jankowski's Testimony

Jankowski testified that, in May, 1970, O'Brien, a man he had known for approximately sixteen years, asked him if he could obtain rifles for an unnamed rod and gun club. Jankowski said he could and soon thereafter met Grady and another person in his store. Grady, he claimed, ordered twelve carbines, left a deposit of $100 to $150, and said he would send the club members into the store to sign for the rifles. (Tr. 628-29, 632, 658-59, 687-88).*

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* Jankowski also testified that the weapons that were ordered were sport rifles, much lighter than the military model of the carbine. (Tr. 635, 653). A Government firearms expert testified in rebuttal, however, that the military version of the M-1 carbine weighed about 5 pounds, the same weight as that of the carbines sold by Jankowski. (Tr. 698-99).

Jankowski admitted discussing business with George Clearwater, also a federally licensed firearms dealer, but his version of the discussions differed substantially from Clearwater's. Jankowski called Clearwater the first time, he claimed, merely to obtain a price at which he could purchase carbines for the club. He testified that Clearwater told him that he would sell the firearms for $55 each. In their second conversation, Clearwater allegedly told Jankowski that he had a friend in New Jersey who had available one thousand firearms if Jankowski wanted them. Jankowski claimed that he told Clearwater he didn't want them, but, inexplicably, asked if he could get a receipt. Clearwater said that he could not give a receipt for the guns. Jankowski then admitted that he had ordered a total of twenty-two carbines from Roskin Bros., a wholesaler, on two occasions, at a cost of $75 each, $20 more than the price quoted by Clearwater. (Tr. 634-37, 639; GX 1, 2). Jankowski later sold each weapon at $105, for a $30 profit. (Tr. 644).

Jankowski admitted that he knew that the law required him to record the name of each person to whom he sold or delivered a firearm. He stated that he had every buyer sign his name in the logbook at the time he received a firearm. (Tr. 669, 692, 693). However, because some of the buyers had young children at home, he asserted that some left their firearms with him. (Tr. 669).

Jankowski also testified that when each club member entered his store, he told Jankowski that he belonged to the same gun club as O'Brien. Although Jankowski never knew O'Brien, his friend of nearly sixteen years, to belong to a gun club, and although he thought it was unusual for so many men to purchase identical weapons, Jankowski never asked for or learned the name of the club. (Tr. 667-69, 686). Indeed, he never learned the name of the club although he himself signed for one carbine and gave it to the club as an alleged business promotion. (Tr. 649-50, 670).

Jankowski also claimed that five or six of the carbines were picked up by five or six club members, a few of whom paid Jankowski directly. On these occasions, Jankowski checked the guns and told his customers where to sign in his logbook, although he himself inserted the date of purchase, as he did in all cases. (Tr. 641-43).

Jankowski claimed to have received cash from Grady for the twenty-two carbines he sold with the exception of those five or six sold to men who picked them up.* He also testified that he delivered the firearms to Grady and another at his store in one shipment at approximately five P.M. one afternoon. (Tr. 642-43, 645-46). Although Jankowski remembered that Grady paid for the two carbines for which he signed, he could not remember if O'Brien and Casey had paid him. (Tr. 663-64, 667).

With respect to his interviews by federal agents, Jankowski claimed, in essence, that whatever the agents testified to which was inculpatory of him was false. Thus, he claimed it was not true that he had told federal agents he purchased a carbine for himself and that he later changed his story; nor was it true that he told them that Grady and his associate asked to buy hand grenades and machine guns, and carbines in large quantities if they could get them unregistered. (Tr. 553, 651-52, 671, 692). Jankowski claimed, instead, that he told the agents that each man who had signed for a carbine told him that he was a member of a rod and gun club. (Tr. 683-85).**

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* Jankowski testified on cross-examination that he had each purchaser listed in his logbook identify himself and that each buyer listed paid him for the firearms they themselves purchased. (Tr. 661).

** The two agents who interviewed Jankowski testified at trial and neither testified in recounting their interviews that Jankowski ever mentioned a rod and gun club.

ARGUMENT

POINT I

The Superseding Indictment, S. 76 Cr. 227, Was Not Time-Barred by the Statute of Limitations

Grady and Jankowski contend that the superseding indictment on which they were tried was barred by the statute of limitations. This contention must fail for three reasons: (1) the superseding indictment on which the defendants were nominally tried was in all material respects identical to an earlier indictment which was not time-barred and which has never been dismissed, and accordingly, except for a different docket number, the defendants were in effect tried on the earlier indictment; (2) the statute of limitations was tolled by the timely filing of the earlier indictment; and (3) the 6-month grace period of 18 U.S.C. § 3288 rendered the filing of the superseding indictment timely.

Indictment 75 Cr. 435, filed on May 2, 1975, charged Grady and Jankowski in Count One with conspiring to violate the federal gun control laws in violation of Title 18, United States Code, Sections 922(m), 923 and 924(a). Counts Two through Eighteen of the Indictment charged Grady and Jankowski with seventeen separate false logbook entries, in violation of Title 18, United States Code, Section 922(m), 924(a) and 2 and Title 26, Code of Federal Regulations, Section 178.125(e). Grady was charged in Counts Nineteen through Twenty-eight with illegally exporting firearms, in violation of Title 22 United States Code, Section 1934; Title 18, United States Code, Section 2; and Title 22, Code of Federal Regulations, Sections 121 *et seq.*, and in Count Twenty-nine with obstruction of justice, in violation of Title 18, United States Code, Section 1510. There is no dispute that this first indictment, 75 Cr. 435, was timely filed within the five-year statute of limitations

provided for in Title 18, United States Code, Section 3282.

Thereafter, Grady filed a pre-trial motion to strike the words "implements of war" from the fifth paragraph of the conspiracy count and to dismiss Counts Three, Four, Five, Eight, Ten, Twelve, Fourteen, Fifteen and Seventeen as well as Twenty through Twenty-eight for failing to allege separate criminal offenses. In its response to Grady's motion, the Government consented to the consolidation of Counts Nineteen through Twenty-eight into Count Nineteen and agreed to correct the indictment accordingly. The District Court acknowledged that this concession by the Government obviated the need for a decision as to those counts and then denied the motion to dismiss Counts Three, Four, Five, Eight, Ten, Twelve, Fourteen, Fifteen and Seventeen.

The superseding indictment, S. 76 Cr. 227, of which the defendants had advance notice, was filed on March 8, 1976—the morning of trial. Indictment S. 76 Cr. 227 charged Grady and Jankowski in Count One with conspiring to commit the same offenses which were alleged as the objects of Count One of Indictment 75 Cr. 435—the superseded indictment. The only changes in Count One of the superseding indictment were minor form changes in certain paragraphs, increased specificity of dates (which had earlier been supplied in discovery), the omission of a means paragraph containing the objected to "implements of war" language and the omission of five overt acts. Counts Two through Eighteen of Indictment 75 Cr. 435 were realleged virtually *in haec verba* in the superseding Indictment, and Count Nineteen of the latter indictment merely represented a consolidation in a single count of the offenses charged in Counts Nineteen through Twenty-eight of the earlier indictment.*

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* Count Twenty-Nine of Indictment 75 Cr. 435 appeared as Count Twenty of Indictment S. 76 Cr. 227. That count was dismissed with prejudice prior to trial.

Grady and Jankowski moved during the trial to dismiss the superseding indictment as barred by the statute of limitations. The motion was denied by the trial court. (Tr. 622-23, 712-13).

Appellants' contend, as they did below, that the Government was barred from proceeding against them under superseding Indictment S. 76 Cr. 227 because the offenses charged in that indictment antedated the date that indictment was returned by more than five years. Their premise is that unless the six-month extension period provided for in 18 U.S.C. § 3288 is applicable, the prosecution must be held to be time-barred.* This argument is frivolous.

A. The Defendants Were Tried in Every Important Respect on the Charges Contained in the First Indictment Which Concededly Was Not Time-Barred

Under no view of the facts of this case have Grady and Jankowski suffered any prejudice as a result of the filing of a superseding indictment—an indictment which was filed largely in response to their pre-trial motions. The objects of the conspiracy count in both indictments are the same. Counts Two through Eight and Fifteen through Seventeen on which both Grady and Jankowski were convicted are virtually verbatim recitations of the same counts in the earlier indictment. Count Nineteen on which Grady was convicted is nothing more than a consolidation of nine counts of the earlier indictment.

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* 18 U.S.C. § 3288 provides in pertinent part as follows:

"Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment . . . is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, . . . which new indictment shall not be barred by any statute of limitations."

But even more importantly, each of the changes made in the superseding indictment—all matters of form not substance and all of which narrowed rather than broadened the charges—could have been made by the trial court without resubmitting the matter to the grand jury. *See United States* v. *Wilner*, 523 F.2d 68, 72 (2d Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69, 72-73 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975); *United States* v. *Colasurdo*, 453 F.2d 585, 590 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Nuccio*, 315 F.2d 627 (2d Cir. 1963); *United States* v. *Stone*, 282 F.2d 547, 553-54 (2d Cir.), *cert. denied*, 364 U.S. 928 (1960); *United States* v. *McCrane*, 517 F.2d 906, 912 (3rd Cir. 1975), *vacated on other grounds*, — U.S.-L.W. — (U.S. June 30, 1976); *United States* v. *Gross*, 511 F.2d 910, 916 (3rd Cir.), *cert. denied*, 423 U.S. 924 (1975); *Thomas* v. *United States*, 398 F.2d 531, 539 (5th Cir. 1967); *United States* v. *Overstreet*, 321 F.2d 459, 461 (5th Cir. 1963), *cert. denied*, 376 U.S. 919 (1964).*

Accordingly, in effect, appellants accuse the Government of proceeding upon an incorrectly numbered accusatory instrument—a mistake which in no conceivable way could have injured either defendant. In a situation closely analogous to the case at bar; Judge Learned Hand observed that:

> "As things were, both indictments stood, and the prosecution was free to elect on which to proceed . . . It selected the wrong indictment . . . The error did not affect [defendant's] 'substantial rights' in the slightest degree: it was the merest formality whether the proceedings should be carried on under one document or other, or on which paper the formal entries should be made." *United*

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* This might not have been the case with respect to Count Twenty of the superseding indictment which added the name of the object of an obstruction of justice. However, that count was dismissed with prejudice prior to trial. See page 2, *supra*.

States v. *Strewl*, 99 F.2d 474, 477 (2d Cir. 1938), *cert. denied*, 306 U.S. 638 (1939).*

Cf. United States v. *Perkins*, 383 F. Supp. 922, 931 (N.D. Ohio 1974).

B. The Filing of the First Indictment Tolled the Statute of Limitations

Moreover, the filing of the superseded indictment tolled the running of the statute of limitations as to the offenses alleged in that indictment, thereby permitting the filing of the superseding indictment, *see United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968), and, therefore, 18 U.S.C. § 3288 has no applicability to this case. The Government's position that the statute of limitations has been tolled is fully consistent with the policy underlying the statute of limitations and has been endorsed by the two Courts of Appeals which have previously examined this issue.**

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* The *Strewl* case is particularly apt, since it involved a situation in which the Government contended that a superseding indictment was not time-barred because of the application of the precursor to 18 U.S.C. § 3288. While this Court held that the statute did not apply, the convictions were affirmed since the original indictment was valid and no prejudice was shown.

** Appellants submit that their position is supported by *United States* v. *Moskowitz*, 356 F. Supp. 331 (E.D.N.Y. 1973). However, *Moskowitz* did not address the issue of whether the filing of an indictment tolls the statute of limitations so as to allow the filing of a superseding indictment. In *Moskowitz*, a case which was decided on a pre-trial motion to dismiss the indictment, the Government sought to obtain the benefits of 18 U.S.C. § 3288 without dismissing the superseded indictment. The court merely held that in order to trigger the benefits of the statute the original indictment had to be dismissed. 356 F. Supp. at 332. However, to the extent that *Moskowitz* implies that a superseding indictment would be invalid under the circumstances of the present case, we submit *Moskowitz* was wrongly decided.

The underlying policies of the statute of limitations are to protect an individual "from having to defend [himself] against charges when the basic facts may have become obscured by the passage of time", *Toussie* v. *United States*, 397 U.S. 112, 114 (1970), and to place him on notice within a certain period of time after an offense has been committed that he will be called upon to defend his activities. *United States* v. *Marion*, 404 U.S. 307, 322-23 n.14 (1971); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

This policy is fully satisfied when, as in the instant case, an indictment is seasonably filed as to certain charges. At that point, the defendant has been placed on notice within the prescribed period of time that he will have to begin to prepare his defense.

Ironically, in arguing that Indictment S. 76 Cr. 227 was time-barred, appellants seek a result which would fly in the face of the policies served by the statute of limitations. Not only would the Government be free to try the appellants on the superseded indictment—which has never been dismissed—but it could also move to dismiss that indictment and after the dismissal present an indictment identical to S. 76 Cr. 227 to the Grand Jury. If such an indictment were voted, the appellants would be placed in the anomalous position of having to go to trial at a point in time far more remote from the time of the offense than was the trial from which they now appeal. Such a result plainly would be inconsistent with the policies underlying the statute of limitations.

In addition to being fully consistent with the policies behind the statute of limitations, the trial court's ruling is also consistent with prior decisions of this Court and of other Circuits. As has been recognized by this Court and the other circuits which have considered the question, the statute of limitations affords no protection to a defend-

ant after an indictment has been filed. *United States* v. *Feinberg*, *supra*, 383 F.2d at 64-65; *United States* v. *Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972) (per curiam); *United States* v. *Garcia*, 412 F.2d 999, 1000-01 (10th Cir. 1969); *Powell* v. *United States*, 352 F.2d 705, 707 n.5 (D.C. Cir. 1965); *United States* v. *Michael*, 180 F.2d 55 (3d Cir. 1949), *cert. denied sub nom. United States* v. *Knight*, 339 U.S. 978 (1950).

Moreover, in both *Wilsey* * and *Garcia*, the courts held that the dismissal of a superseded indictment was

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* In *Wilsey*, a seven-count indictment was returned within the applicable period of limitations. Thereafter, two superseding indictments were filed covering the same offenses as had been charged in the superseded indictment. The superseded indictment was not dismissed until the start of trial and the defense moved to bar the trial on the superseded indictment on the grounds that the statute of limitations had run and that the six-month grace period provided for in 18 U.S.C. § 3288 was not applicable since the original indictment had not been dismissed. The Ninth Circuit rejected this reasoning holding "the grace period is not needed under the facts here—the filing of an indictment results in the tolling of the statute upon the charges embraced . . . that tolling continues until the indictment is dismissed." 458 F.2d at 12.

The Court went on to note that:

> "Section 3288 applies in those cases where a defendant succeeds in securing dismissal of his indictment for error, defect or irregularity. It serves to protect the government in securing correction of such matters by assuring that the continued running of the statute will not permit the defendant to escape through technicality before correction can be secured. See. *United States* v. *Strewl*, 99 F.2d 474 (2d Cir. 1938). The statute has no application here." *Id.*

Grady and Jankowski have attempted to blunt the thrust of *Wilsey* by contending that it is based on an incorrect analysis of the *Feinberg* and *Powell* decisions. While appellants correctly state that the latter two decisions dealt with the issue of pre-arrest delay, both decisions explicitly stated that the filing of an indictment tolled the statute of limitations. The *Wilsey* court merely applied that principle to the facts which were before it.

[Footnote continued on following page]

not a condition precedent to the validity of the superseding indictment. Rather, both courts held that the filing of the initial indictment tolled the statute of limitations as to the charges contained in such indictment.

C. In Any Event, The Grace Period Provided by 18 U.S.C. § 3288 Was Available to the Government

Even if the Court were to find that the superseding indictment differed from the earlier indictment in material respects and that the first indictment did not toll the statute of limitations, it is clear, as Judge Brieant found, that the 6-month grace period provided by 18 U.S.C. § 3288 rendered timely the filing of the superseding indictment.

Appellants argue that to trigger the grace period of 18 U.S.C. § 3288 an actual dismissal of the earlier indictment is required. See *United States* v. *Moskowitz*, *supra*, 356 F. Supp. 331. However, as Judge Brieant ruled, to have required an actual dismissal in the instant case would be to require a needless formality. (Tr. 622).

The superseding indictment was largely the result of changes requested by the defendants in pre-trial motions.

Appellants further argue that *Wilsey* is "illogical", contending that if the filing of an indictment tolled the statute of limitations then 18 U.S.C. § 3288 would never have to be applied. This argument is flawed because—as the *Wilsey* court noted—section 3288 only becomes operative if the indictment is dismissed or otherwise found to be defective. At that point, the statute of limitations would begin running again and section 3288 would allow an additional grace period for an indictment to be returned. Thus, assuming an indictment were initially filed one month prior to the expiration of the statute of limitations and thereafter dismissed, section 3288 would allow the Government six months instead of one month to reindict the defendant.

In ruling on these motions the trial court explicitly stated that, by agreeing to consolidate counts 19 through 28 and to correct the indictment accordingly, the Government had obviated the need for a decision as to those counts. Since the superseding indictment was in response to technical objections raised by the defense, whether or not the Government made the requested changes through compulsion from the court—as in the case of a dismissal—or voluntarily through a superseding indictment, was a matter of no real significance. In these circumstances, Judge Brieant correctly ruled that the Government had an affirmative duty to correct irregularities in the indictment and that the ministerial act of dismissal was not a condition precedent to the application of 18 U.S.C. § 3288. (Tr. 623).

POINT II

The Evidence Was Sufficient to Prove That False Entries Were Made in Jankowski's Logbook

Grady and Jankowski argue that the evidence was, as a matter of law, insufficient to support their convictions for falsifying Jankowski's logbook, since all the law required to accomplish its purpose was the entry of the true names and addresses of the men who signed the book, and since the statutes ought to be narrowly construed to accomplish no more than the purpose for which they were enacted. Appellants also allude to alternative claims that the proof at trial demonstrated nothing more than a "group sale" to the persons who signed the logbook and that Judge Brieant incorrectly relied on the fact that false transfer documents were provided to many of the logbook signatories in assessing the sufficiency of the Government's proof. These claims are meritless.

and Fifteen through Seventeen make it a crime for a licensed firearms dealer knowingly to make false entries of sales and dispositions of firearms in records required to be kept by statute or regulation, 18 U.S.C. §§ 922m, 923(g). As a federally licensed firearms dealer, Jankowski was required to enter into a permanent record information concerning the "sale or other disposition" of every firearm in his inventory. 26 C.F.R. § 178.125 (e). To fully satisfy this regulation, Jankowski was duty-bound to enter "the name of the person to whom the firearm . . [was] transferred." *Id.*

The purposes served by these statutes and regulations are vitally important ones. The required entries are *"designed to keep a constant record of the transfer and location of firearms in order to reduce the indiscriminate flow of . . . weapons and the crime that inevitably follows in their wake."* *United States* v. *Scherer*, 523 F.2d 371, 374 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1108 (1976) (emphasis supplied). See also *Huddleston* v. *United States*, 415 U.S. 814, 824-25 (1974).

Appellants' claim that the law enforcement purposes of 18 U.S.C. §§ 922(m) and 923(g) were fully satisfied by the entry into the logbook of the true names and addresses of the men who signed the book, even though those men did not purchase the weapons they signed for, is utterly preposterous.* The premise of this argu-

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* Appellants contend that the statute is to be narrowly construed so that a true name and address is all that the law requires. However, the criminal firearms statutes are, of course,

> "not to be construed so strictly as to defeat the obvious intention of the legislation . . . broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 44 U.S.L.W. 4050, 4052 (U.S. Jan 13, 1976).

See also United States v. *Powell*, 44 U.S.L.W 4010, 4011 (US. Dec. 2, 1975); *United States* v. *Lopez*, 521 F.2d 437, 441 (2d Cir.), *cert. denied*, 96 S. Ct. 421 (1975).

ment is the proposition that men who signed the logbook "aided the government in locating firearms by their entering true information in compliance with the statutes and regulations" (Br. at 33), and that, therefore, the purpose of the statutes was served.

It is patently obvious that this contention is based on a complete distortion of the record. The firearms were located because of their seizure in Northern Ireland, not because of any aid provided by the persons listed in Jankowski's logbook. Indeed, the very purpose of entering in the logbook the true names and addresses of a number of men who were not the actual transferees was to cover up the fact that large numbers of weapons were being accumulated in one place for illegal shipment to Northern Ireland. *Cf. United States* v. *Resnick*, 488 F.2d 1165 (5th Cir. 1974); *United States* v. *Haimowitz*, 404 F.2d 38, 39-40 (2d Cir. 1968); *United States* v. *Honer*, 253 F. Supp. 400 (S.D.N.Y. 1966) (Weinfeld, *J.*). The entry of true names and addresses was designed to make it all the more difficult to uncover the scheme. This was, in short, a direct effort to subvert the purposes which 18 U.S.C. §§ 922 (m) and 923(g) serve of facilitating the location of firearms and preventing the flow of weapons to persons who will use them to commit crimes. See *United States* v. *Resnick*, *supra*, 488 F.2d at 1166.*

Equally unpersuasive is appellants' argument that the evidence proved only a "group sale" as to which

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* *Resnick* provides direct support for the obvious proposition that 18 U.S.C. §§ 922(m) and 923(g) proscribe the knowing entry into firearm records of the true names and addresses of persons who are not actually the transferees of weapons. There, Resnick, a federally-licensed firearms dealer, was convicted of failing to keep appropriate records when he permitted an employee to fill out the firearms transaction record listing herself as the transferee using her true name and address, even though he gave the firearms to other persons. See 488 F.2d at 1166-67.

"Jankowski insisted that each person as an individual sign the record in the shop." (Br. at 31). To the contrary, when the evidence is viewed in the light most favorable to the Government, as it must be after a jury determined guilt, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), it is manifest that the "group" which received the weapons, Grady, Lyons and the Irish Republican Army, did not include many of the men who signed for them, including Dennehy, McMorris, O'Brien and Casey.* Indeed, Dennehy, McMorris, O'Brien and Casey not only never paid for or received any weapons, but it is clear they never expected to.

Finally, appellants contend that, in assessing the sufficiency of the Government's proof, Judge Brieant incorrectly relied on the fact that false transfer documents were provided to Dennehy, McMorris, Casey and O'Brien to show that they had transferred the weapons which they had allegedly purchased at Jankowski's store to other persons who were actually deceased. (Br. at 30). To the contrary, this evidence was highly inculpatory, particularly of Grady. The evidence that the logbook signatories were provided false transfer documents by Grady and Lyons showed, first, concern that the signatories might later need protection against claims that they were the last persons to possess the weapons before receipt in Northern Ireland; second, that it was never intended that the signatories would come into possession of the weapons; and third, that Grady and Lyons were inextricably involved in this illegal scheme.

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* Casey carried a number of carbines for a short time after they were picked up at Jankowski's, but when he did so, he did it not for himself, but at the direction of either Grady or Lyons or both. In any event, he did not receive a firearm at or about the date when he signed Jankowski's logbook, and there is no evidence that he ever carried the specific carbine for which he signed.

Nor did Judge Brieant, as appellants intimate, advise the jury that the providing of the false transfer documents was itself a violation of 18 U.S.C. § 922(m). (Br. at 29-32). He merely instructed the jury that these false transfer documents could be considered in determining whether the logbook entries were intended to be false:

> "In considering whether it is possible to make a false entry in a Federal firearms record by recording the true name, address, social security number, the date of birth of a person next to the serial number for the particular [illegible]-1 carbine, you may consider that activity in connection with the contention that papers were then issued to the persons who were then listed in the logbook which indicated each person had transferred his firearms to a third party at a date subsequent to purchase, and also, the statement attributed to a member of the conspiracy to the effect that those persons were deceased." (Tr. 915).*

Judge Brieant then went on to make it abundantly clear that neither Jankowski nor Grady could be found guilty unless they knew the entries in the logbook were false when made:

> "If Jankowski did not know that the names recorded were not those of the true transferees as required by the statute and regulations as I have just read, he must be acquitted on those false record substantive counts . . . and so also Mr. Grady. . ." (Tr. 916).

Moreover, it cannot seriously be argued that there was insufficient evidence of Jankowski's knowledge that

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* In any event, no objection was taken to this charge. See Fed. R. Crim. P. 30; *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

the entries were false. First, when O'Brien introduced Lyons to Jankowski, Jankowski was told that the men wanted to purchase weapons, including machine guns and hand grenades, for shipment to Northern Ireland. Second, Jankowski then sought to obtain *unregistered* carbines from George Clearwater. Third, neither Casey, O'Brien, McMorris or Dennehy was ever asked to explain his presence in Jankowski's store before Jankowski produced, and each man signed, the logbook. Fourth, Jankowski never delivered firearms to the men at the time they signed and he later participated in a late night bulk transfer of the carbines to Lyons, Grady and Casey. Finally, the jury was entitled to take into consideration the incredibility inherent in Jankowski's self-serving testimony. See *United States* v. *Mariani*, Dkt. No. 76-1075, slip. op. 5045, 5052 (2d Cir., July 19, 1976; *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 & n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Arcuri*, 405 F.2d 691, 695 & n.7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); *cf. Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

POINT III

Reports of the Royal Ulster Constabulary and Ministry of Commerce of Northern Ireland Were Properly Admitted into Evidence

Appellants contend that it was error to admit into evidence records of the Department of Industrial and Forensic Science of the Ministry of Commerce and of the Royal Ulster Constabulary, each of Northern Ireland, which were entitled Material Forwarded for Examination (GX 7) and Order for Disposal of Firearms/Ammunition (GX 8), respectively, on the ground that the documents constituted inadmissible hearsay. To the contrary, as shown below, the reports were properly admitted in redacted form under Federal Rules of Evi-

dence 803(8)(B), 803(6), 803(24) and 804(b)(5). Moreover, because the subsequent transfer of the weapons to Northern Ireland was relevant solely to Count Nineteen, which alleged the unlawful export by Grady of ten weapons, the admission of the forms was at most harmless error, since there was live testimony at trial which demonstrated that four of these weapons had been transferred to Northern Ireland subsequent to their dates of purchase.

The reports entitled Material Forwarded for Examination (GX 7) recorded the date when certain weapons were received by the Department of Industrial and Forensic Science from the person who delivered or sent the materials and the date when they were returned.* The reports entitled "Order For Disposal of Firearms Ammunition" (GX 8) recorded the date and place and official of the Royal Ulster Constabulary who ordered that the weapon described be disposed of.**

Judge Brieant admitted these exhibits into evidence for the very limited purpose of showing that the specified weapons were found in Northern Ireland on dates subsequent to the May 1970 purchases by Grady. (Tr. 437, 702). None of the reports were shown or read to the jury and the only reference to them was by the Assistant United States Attorney in his summation where he said

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* The forms go on to describe the source of the materials and the date and place of seizure. However, none of this information was ever brought to the attention of the jury. (Tr. 437, 603, 702-04, 797-98).

** The form had annexed to it a list of the items to be disposed of and further described them as being "found by," "surrendered to", "seized and handed to" or "seized" by a Police Constable on or about a certain date. None of this information was ever brought to the attention of the jury. (Tr. 437, 603, 702-04, 797-98).

the reports established that the weapons were seized in Northern Ireland. (Tr. 437, 603, 702-04, 797-98).

A. The Exhibits Were Properly Admitted Under Federal Rule of Evidence 803 (8) (B)

In the main, appellants rest their argument that the reports were improperly admitted on the exclusions from admissible hearsay contained in Rule 803(8)(B):

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * * * *
>
> (8) * * * Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel . . .*" (emphasis added).

This argument is without merit for two reasons.

First, the premise underlying appellants' argument, that both of the disputed exhibits were reports of "matters observed by police officers and other law enforcement personnel," is faulty. Northern Ireland's Department of Industrial and Forensic Science of the Ministry of Commerce is not a law enforcement agency, but is, rather, a laboratory of forensic sciences, which is responsible for providing expert evidence to the Irish courts. (GX 7, Attestation of Alfred John Howard, Ph.d). Since the reports of this Department were offered simply to show the receipt of certain weapons for scientific examination purposes and the receipts were not

police reports, the exclusion from 803(8)(B) upon which appellants rely is clearly inapplicable.*

Second, as Judge Brieant found, these reports (GX 7 and 8) were not the sort which the Rule 803(8)(B) exclusion was meant to cover. The Congressional floor debate which led to the enactment of the exclusion contained in Rule 803(8)(B) reflected a concern that, in the absence of the exclusion, prosecutors might prove their cases in chief by simply putting into evidence police officers' reports of contemporaneous observations of crimes. Cong. Rec. at 563-65 (Jan. 6, 1974); J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 803, at 16-21 (1975). Congress was concerned that a defendant would in that way be completely deprived of an opportunity to confront his accuser:

> "Mr. Dennis: . . . I think the point is that we are dealing here with criminal cases, and in a criminal case the defendant should be confronted with the accuser to give him a chance to cross examine . . .
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> * * * * *
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> This applies only to a hearsay exception, where it would be attempted to bring this report in instead of the officer to prove one's case in chief, which one would do if we do not pass this amendment . . ." *Id.* at ¶ 803, at 18, 21.

Plainly, these reports were not the sort which Congress intended to exclude. The reports did not concern

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* To be sure, there is information in the Department's reports concerning the time and place of the seizure of the weapons which was supplied by the police. However, the Department's own employees prepared receipts for the weapons, and the fact of receipt of the weapons by the Department was sufficient to support the limited purpose for which the reports were offered, namely, to show that the weapons were in Northern Ireland sometime after May, 1970.

observations by police officers of defendants' commission of crimes; instead, they concerned the routine function of recording the serial numbers and receipt of certain weapons found in Northern Ireland—over 3,000 miles from the defendants' residences. The reports did not concern crimes committed by the appellants, nor did they begin to prove the Government's entire case in chief. In no real sense, therefore, can the reports be said to have accused the defendants of a crime. The reports in this case were clearly not the sort Congress intended to exclude.

B. The Exhibits Were Also Admissible as Business Records Under Rule 803(6)

But even assuming that the records were improperly admitted under 803(8)(B), they were admissible under Rule 803(6) as business records.*

The legislative history underlying Rule 803(6) makes clear the intent to carry forward the hearsay exception for business records previously embodied in the Federal Business Records Act, 28 U.S.C. § 1732, and police records had long qualified in various circumstances as business records under that Act.** *E.g.*, *United States* v. *Fricks*, 409 F.2d 19 (5th Cir. 1969); *United States* v. *Wolosyn*, 411 F.2d 550 (9th Cir. 1969).

In *United States* v. *Fricks*, *supra*, which involved a theft of certain rifles from an interstate shipment from

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* The failure of certain records to meet the standards reflected in one hearsay exception do not preclude admission pursuant to another exception. J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 803(8)[03], at 185 (1975).

** Rule 803(6) specifically states that the "term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

California to Alabama via New Orleans, the records admitted were the New Orleans Police Department inventory records of the rifle shipment which, along with the inventory records of the California shipper and the Alabama purchaser, were used to prove that the stolen rifles were part of the interstate shipment. Again, in *United States* v. *Wolosyn*, *supra*, where defendant was convicted of interstate transportation of stolen motor vehicles, the police report qualified as a business record insofar as it reflected the date on which one of the vehicles was reported stolen, which date was read to the jury. The records in the present case are of a similar nature—reports of when and where certain weapons were in the inventory of the Department of Industrial and Forensic Science or the Royal Ulster Constabulary.

Moreover, in this case, sufficient evidence exists to qualify the records as records of regularly conducted activity. Richard Anderson, an officer of the Royal Ulster Constabulary in Northern Ireland in charge of arranging the disposal of firearms, testified that Government Exhibits 7 and 8 were documents which normally accompanied firearms coming into his possession for disposal. (Tr. 430-32). While Anderson was not the custodian of the reports, he was certainly a qualified witness. (Tr. 437). Moreover, each exhibit contains a statement from the custodian of the official records attesting that they are kept and made pursuant to statute.* The

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* For example, Government Exhibit 8 contains the following attestation, dated February 23, 1976:

> "I, James Bernard Flanagan, C.B.E., am Chief Constable of The Royal Ulster Constabulary, the civil police for Northern Ireland, United Kingdom. Pursuant to the Firearms Act (Northern Ireland) 1969, as amended, the Constabulary (Ireland) Act 1836 and the Police Act (Northern Ireland) 1970 The Royal Ulster Constabulary is charged

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testimony of Anderson, along with the attestations of the official custodians over whom the Government lacks compulsory process, establish that the reports were kept in the regular course of business and that it was the regular practice to make such reports, as required by Rule 803(6).*

Nor is there anything about these reports that indicates a lack of trustworthiness, especially as they were compiled by the Government in Northern Ireland for its internal use. Indeed, Anderson's testimony provides independent evidence of the reliability of the reports for

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with securing, maintaining and disposing of all weapons within the territory of Northern Ireland which are not lawfully held by virtue of a statutory certificate or permit or otherwise in the possession of legitimate Governmental Authorities. Pursuant to this duty, officials of The Royal Ulster Constabulary under my supervision regularly make official records of the seizure, maintenance and disposal of all such weapons. These official records are maintained in my custody and control. I attest that the attached documents are true and accurate copies of original official records or entries therein, in my custody and control required by the nature of this office and made by officials of The Royal Ulster Constabulary under my supervision and in the course of their official duties."

* *E.g., United States* v. *Leal*, 509 F.2d 122 (9th Cir. 1975) (affidavit of assistant manager of Hong Kong hotel describing procedures for completing hotel registration card and telephone reservation requests was sufficient foundation on which to admit such documents as business records in suit charging defendant with illegal importation of heroin into United States); *United States* v. *Blum*, 329 F.2d 49 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964) (affidavit of Swiss Counsel that his office in New York, which keeps records of imports of Swiss watches, has no records of defendant's watches, was admissible as a business record to prove illegal importation of Swiss watches under the theory that the watches could not have come into the United States unlawfully without an official record of transportation). *See also, Blanchard* v. *United States*, 360 F.2d 318 (5th Cir. 1966) (proper to admit, as a business record, written certification by head of Drug Disposal Committee of the Federal Bureau of Narcotics that heroin in defendant's case had been destroyed, as proof that the substance obtained from the defendant was heroin).

the limited purpose for which they were admitted, since he testified that five weapons, admitted into evidence (GX 13-17) and also identified in Government Exhibits 7 and 8, had come into his possession in Northern Ireland.*

Appellants acknowledge, without discussion, the applicability to police records of the business records exception provided by Rule 803(6), but appear to argue that police reports are inadmissible as business records where there is no one to cross-examine who has first hand knowledge of the information contained in the reports. (Br. at 42). Their argument, however, misperceives the very purpose of the business records exception, which is to allow reliable and accurate records to be introduced without the necessity of producing the author of the entries.**

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* Four of the five weapons identified by Anderson are weapons listed in Count 19. Anderson also testified that all of the weapons identified in Government Exhibits 7 and 8 were now in his official custody or in transit from the police department to his custody. He was unable, however, to state precisely when the weapons and documents had first come into his custody. (Tr. 431-32, 438).

** Nor do the cases relied upon by appellants support their contentions, since appellants confuse the requirement that the records reflect personal knowledge, as they do here, with their insistence that the person with knowledge be available for cross-examination. For example, *United States* v. *Burruss*, 418 F.2d 677 (4th Cir. 1969); *United States* v. *Shiver*, 414 F.2d 461 (5th Cir. 1969) and *United States* v. *Graham*, 391 F.2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968) all presented similar fact situations: prosecutions for interstate transportation of stolen motor vehicles where, in the absence of the testimony of the vehicles' owners, the sole proof offered of the fact that the vehicles *were stolen* were police theft records reflecting the fact that the vehicles had been *reported stolen*. In each instance, the police records, while deemed business records, were ruled inadmissible because they did not reflect personal knowledge of the theft, only of the report of theft. Thus, the reports were inadmissible *not* because the officer was not available for cross-examination but because that police officer could not have testified to the fact of the theft had he been available.

Of greater significance is the acknowledgement in each case that the police reports could have been admitted, under the busi-

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Accord, United States v. *Re*, 336 F.2d 306, 314 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); *United States* v. *Foreign Trade Zone Operators*, 304 F.2d 792, 796 (2d Cir. 1962); *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F.2d 934, 937-38 (2d Cir. 1927); 5 Wigmore, Evidence § 1530 (Chadbourn Rev. ed. 1974).

C. The Reports Were Admissible, In Any Event, Under Rules 803(24) and 804(b)(5)

Alternatively, the reports were also admissible as reliable and necessary hearsay under Rule 803(24). The first requirement of 803(24) is that there be "circumstantial guarantees of trustworthiness." As previously noted, these reports were not prepared by persons directly concerned with the prosecution of this case, but were for the internal use of the civil police force and Ministry of Commerce of Northern Ireland. Moreover, there was independent evidence, through Anderson's testimony that he took custody of four of the twelve weapons in Northern Ireland, that the reports were reliable for the purpose offered, *i.e.*, to show that the twelve weapons were ultimately found in Northern Ireland.

The second requirement, that the statement be offered as evidence of a material fact, is conceded by appellants (Br. at 36), since the transport from the United States is an essential element of Count Nineteen.

The third requirement, that the statement be more probative than any other evidence on the point which

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ness records hearsay exception, to prove the fact that the owners had reported the vehicles stolen, *without* the accompanying testimony of the officer to whom the theft had been reported. Here, the records were admissible to prove that the carbines were in the possession of the Department of Industrial and Forensic Science or the Royal Ulster Constabulary, a fact with respect to which the persons who made the reports or persons under their supervision did have personal knowledge.

can reasonably be produced, is also met, since the only other evidence of when and where the weapons were found would be the testimony of the numerous officers of the Royal Ulster Constabulary, or others, who found the weapons and whose presence at trial the Government was unable to compel.

Moreover, the general purposes of these rules and the interests of justice are served by the admission of this limited hearsay. Lastly, while notice of the hearsay statements was not given in advance of trial, they were properly admissible since the defendants did not claim prejudice or request a continuance of the trial. See *United States* v. *Iaconetti*, 406 F. Supp. 554 (E.D. N.Y. 1976) (notice of intention to offer the statement given during trial); J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 803(24)[01] (1975).*

The exhibits were also admissible under Rule 804 (b)(5), another open-ended exception for hearsay identical with Rule 803(24), but predicated on the unavailability of the declarant. In the present case, the government was unable to procure the presence of the declarants by process, since each was a resident of Northern Ireland.

While the tests of Rules 803(24) and 804(b)(5) are identically worded, the admissibility under the latter should be granted more liberally. As one commentator has noted:

> "Rule 804(b)(5) is predicated upon the assumption that declarant is unavailable. The need for the evidence will therefore, be self-evident. If the hearsay is relevant and no other evidence or very little other evidence is available on the same point, this need will be great. If in addition, probative value is high because some indicae

* Notice of intention to use the reports was given to the defendants on the first day of trial. (Tr. 445-46).

> of reliability are present, the trial judge may conclude that the hearsay statement is admissible pursuant to Rule 804(b)(5) when a trustworthiness within the spirit of the Rule 804 class exceptions has been demonstrated." J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 804(b)(5) [01] (1975).

Exhibits 7 and 8 were thus properly admitted for the limited purpose of showing that the weapons were ultimately found in Northern Ireland.

D. Alternatively, the Admission of Government Exhibits 7 and 8 Was Harmless Error

Contrary to appellants' suggestion, the Government reports were not the sole proof offered by the Government of the fact that the weapons specified in Count Nineteen (the only count with respect to which the reports were introduced) were ultimately found in Northern Ireland. Richard Anderson, an officer of the Royal Ulster Constabulary in Northern Ireland in charge of the Arms Department, identified four of the ten weapons specified in Count Nineteen as weapons which came into his official custody in Northern Ireland (Tr. 432-35) and, of course, O'Brien, Dennehy and Casey each testified that Grady told them the weapons they signed for were going to, or had arrived in Northern Ireland.

Anderson's testimony alone was a sufficient basis on which the jury could find that four of the ten weapons identified in Count Nineteen had been exported to Ireland. The admission of the corroborative official public reports was, therefore, at most harmless error. *E.g.*, *Frazier* v. *United States*, 163 F.2d 817 (D.C. Cir. 1947), *aff'd*, 335 U.S. 497 (1948).

POINT IV

The Trial Court Correctly Permitted the Introduction of Subsequent Similar Act Testimony

Appellants contend that the trial court erred in permitting the introduction of evidence that Grady continued to obtain firearms for shipment to Northern Ireland after the events charged in the indictment.* This contention is meritless.

Casey testified that during the summer and fall of 1971, he had accompanied Grady to locations where he observed trunks containing firearms. One of the trunks which Casey observed bore the name and address of a priest in Galway, Ireland. (Tr. 254-59). On a second occasion, Casey helped Grady load a crate of firearms into Grady's car. (Tr. 255). On still a third occasion, Casey helped Grady and Lyons carry into an apartment in the Bronx a heavy trunk which Lyons told him contained weapons. (Tr. 259-61). Finally, Casey testified that in October 1971 he picked up a shotgun at Grady's request and delivered it to the latter's home. (Tr. 262-63).

As this Court stated in *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), a case involving subsequent similar acts, "[i]t is settled law in this Circuit that evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." See also *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 96 S. Ct. 457 (1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d

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* The trial court ruled that this evidence was admissible to show Grady's motive and intent and as bearing on Casey's credibility. (Tr. 762). The court instructed the jury to this effect. (Tr. 776-77).

Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied sub. nom. Santiago* v. *United States*, 415 U.S. 976 (1974); *United States* v. *Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966).

The evidence of subsequent similar acts was clearly probative of Grady's knowledge, intent and motive. F.R. Evid. 404(b). The gist of the crimes charged in the indictment centered on a scheme to obtain firearms for shipment to Northern Ireland without making the appropriate entries in records required to disclose the transfer of firearms. From Casey's testimony, the jury could have inferred that Grady was involved in a continuing scheme to clandestinely ship firearms, thereby tending to establish that he had knowingly and intentionally committed the crimes charged in the indictment. To the extent that Casey's testimony established Grady's knowledge that Ireland was the ultimate destination of all the weapons, it was certainly relevant to the Government's proof on Count Nineteen of the Indictment, which charged Grady with aiding and abetting the export of firearms, and was probative of Grady's motive in the case of the other substantive counts. Moreover, as the trial court noted, this testimony was relevant to the jury's consideration of Casey's credibility, and the testimony also corroborated every witness who testified that the weapons were intended for shipment to Northern Ireland.

In any event, the evidence of subsequent similar acts related to activities which were both closely related in time and subject matter to the crimes charged in the indictment, *United States* v. *Byrd*, 352 F.2d 570, 574-75 (2d Cir. 1965), and it is well settled that the admissibility of similar act evidence is within the broad discretion of the trial judge, *United States* v. *Natale*, 526 F.2d

1160, 1174 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (U.S. April 26, 1976), whose determination will rarely be reversed on appeal. *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (U.S. May 3, 1976).

POINT V

The Court's Charge on Aiding and Abetting Was in All Respects Proper

Grady contends that Judge Brieant failed to instruct the jury that in order to convict him of aiding and abetting Lyons in the unlawful export of firearms charged in Count Nineteen, they must find that Lyons was not lawfully licensed to export the weapons. In addition, Grady further argues that there was no evidence that Lyons was not licensed to export firearms. Neither argument is supported by the record.

A. Sufficiency of the Evidence

Grady concedes that there was sufficient proof from which the jury could infer both that Lyons exported the carbines and that Grady aided and abetted him. (Br. at 47). Moreover, the evidence that Lyons had not obtained a license to export the weapons, viewed as it must be in the light most favorable to the Government, was more than sufficient.*

Casey testified that, in the summer of 1971, he and Grady met with Jack Lynch in the basement of Lynch's home where Casey saw two trunks, one closed and one open, the latter containing approximately twenty weapons.

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* There was unquestionable proof that Grady was not licensed or otherwise lawfully empowered to export the weapons. (GXs 5, 6).

The open trunk was stencilled on its side with the name and address of a priest in Galway, Ireland. (Tr. 257-59, 324). During that same summer, Casey was told by Grady that Lyons had dressed as a priest and had gone down to the docks to ship two trunks to Ireland (Tr. 263-64), and Lyons himself told Casey that he had spent some time in the hills with the IRA. (Tr. 265). Casey's testimony thus provided a sufficient basis from which the jury could infer that Lyons had not only shipped, but had accompanied, the weapons to Ireland in the guise of a priest and that he would not have resorted to this subterfuge to transport these weapons had he been lawfully licensed to export them.

Also pointing directly to the conclusion that the weapons were exported without a license by an associate of Grady's were the facts that: the weapons were specifically purchased for export to the Irish minority in Northern Ireland; the buyers informed Jankowski that they would purchase large quantities of weapons if they could get them unregistered; Jankowski's logbooks were signed by straw purchasers; transfer documents were prepared which falsely stated that the weapons had been transferred to still other individuals; and the weapons were ultimately seized in Northern Ireland. (Tr. 75-76, 98, 116, 130, 286-87, 553). Thus, the jury could reasonably have inferred from the evidence that the carbines were intended to be, and were, purchased and exported to Northern Ireland in a manner designed to circumvent the notice of any authorities. Moreover, Grady's purchase of guns for the IRA was plainly a clandestine undertaking and for that reason alone, the jury could have concluded that those associated with the export of the firearms would not seek out the services of a licensed exporter who would be required to identify the shipper, the type of firearms involved, and their destination.

B. Sufficiency of the Charge

Grady also alleges error in Judge Brieant's charge for failing to "make clear that the jury must find that Lyons exported without a license in order to find Grady guilty of aiding and abetting an unlawful export." (Br. at 48). His argument is frivolous.

Judge Brieant made it abundantly clear that to convict Grady as a principal he had to be unlicensed as an exporter. (Tr. 928-29). He also made it equally clear that to convict Grady of aiding and abetting an illegal exportation, the jury first had to find all the elements which proved an illegal export (Tr. 928), particularly that the exporter was unlicensed. Then, to ensure that his charge on this matter was crystal clear, Judge Brieant reiterated his instructions in summary form at the conclusion of the charge:

> "Once again I must remind you, you can only find Mr. Grady guilty on Count 19 if you are satisfied that the Government has proven all four elements of the offense as I have explained them to you beyond a reasonable doubt. You can infer that the defendant knowingly and wilfully aided in the export of these articles, these rifles, if you find that he had said that he had done so, and if you find at a particular point in time that these particular rifles were in Yonkers in his possession and were later found in Northern Ireland, *even if you think that the actual exporting was done by Martin Lyons, or by unknown persons, providing that the exporting was unlawful and done without a license.*" (Tr. 930-31) (emphasis added).

Grady also appears to argue that the jury was confused into believing the Government could prove Grady's aiding and abetting of the unlawful exportation of firearms even if the Government proved only that Grady

alone was unlicensed, since the jury was referred to the third element as originally charged wherein Judge Brieant used the word "Grady" rather that "exporter." Such a claim not only overlooks the full language of Judge Brieant's charge on aiding and abetting (Tr. 922-925, 930-31), but ignores the maxim that juries are able and determined to follow instructions. *Bruton* v. *United States*, 391 U.S. 123, 135 (1968); *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953); *United States* v. *Kaplan*, 510 F.2d 606 (2d Cir. 1974).

Finally, Grady's failure to object to the charge as given constitutes a waiver of any claim on appeal. (Tr. 939-41). Rule 30, Fed. R. Crim. P.; *United States* v. *Goldberg*, 527 F.2d 165 (2d Cir. 1975); *United States* v. *Pinto*, *supra*, 503 F.2d at 723-24.

CONCLUSION

The Judgment of Conviction Should Be Affirmed

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Beverly C Powell being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 4 day of August, 1976 she served a copy of the within brief 76-1201 (corrected copy) 4 copies by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Beverly Powell

Sworn to before me this
5th day of August, 1976.

Maria A. Morales

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No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1978